TIE OUT—A CASE FOR THE EXTENSION OF TYING THEORY

I. INTRODUCTION

Tying arrangements are categorized as per se offenses of the antitrust laws. However, unusual requirements for triggering the application of the per se rule with respect to tying arrangements have given rise to considerable controversy concerning the appropriateness of their per se categorization. Moreover, the recognition that the underpinnings of tying theory have a broader application than is currently accepted and, therefore, applicability to a much greater range of conduct, suggests that the grounds for questioning the legitimacy of the per se label should be multiplied. One such area of conduct to which, in substance, tying theory may easily be applied can be termed "tie-outs."

This note briefly examines the history of the development of per se categories in general and focuses on the theoretical and mechanical underpinnings of tying theory as vehicles to the understanding of the "tie-out." In this light, the "tie-out" development will be seen as a natural and logical step in the fulfillment of tying theory, and as equally deserving of the per se label as traditional tying arrangements. The bottom line of the "tie-out" development is not only recognition of the broader applicability of present tying theory, but also the hope that this development will stimulate a much needed reevaluation of the legitimacy of attaching the per se label to the category of tying arrangements.

II. THE DEVELOPMENT OF PER SE CATEGORIES

As indicated above an understanding of the underpinnings of the development of per se categories in general is fundamental to ascertaining the validity of the current tying arrangement as a per se category and the appropriateness of the "tie-out" as conduct also deserving of that per se label.

After an arduous and largely academic controversy, the principle emerged that the courts' evaluation of suspect conduct under the antitrust laws would follow a "rule of reason" approach.[1] The rule of reason

[1] Justice White in Standard Oil Co. v. United States, 228 U.S. 1 (1911), resolved the theoretical controversy which had long plagued the relatively new antitrust laws. The largely academic controversy concerned the language of § 1 of the Sherman Act which read: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . . ." 15 U.S.C. § 1 (1970). Since every contract involves restraints of trade to some degree it was feared that "every" would render *all* contracts subject to prosecution under the antitrust laws. Justice Taft in United States v. Addyston Pipe & Steel Co., 175 U.S. 211 (1899),

approach entails a case by case inquiry into the purposes and effects of suspect conduct in order to determine, in the particular circumstances before the court, whether an undue restraint of trade has occurred.[2]

Since *Standard Oil Co. v. United States*[3] which is credited with establishing the foundation of the rule of reason approach, however, the Supreme Court has developed a significant number of so-called per se unreasonable categories of conduct.[4] Per se unreasonable categories consist of conduct characterized as having an inherently anticompetitive purpose and effect of such magnitude that the conduct will in most instances be deemed to be an undue restraint of trade. In apposition to the comprehensive market analysis involved in the rule of reason approach, the per se approach allows the court, although embarking on market analysis, to end its inquiry with the mere identification of the suspect conduct as conduct within one of the recognized per se categories. In other words, a continuum may be envisioned upon which the quantum of proof necessary, and thus the degree of market inquiry required, is a direct reflection of the nature of the conduct. For example, as experience demonstrates that certain conduct is inherently legal or illegal, little proof is required to support the legality or illegality of that particular conduct. Moreover, analysis may indicate that the suspect conduct, although not within those categories recognized as inherently legal or illegal, is similar to one of these two extremes. Therefore, although requiring more proof than activity found at the extremes, the legality of the particular suspect conduct nevertheless can be established upon less proof than conduct not so closely identified with either of the two extremes. Activity which has no identity with the extremes—that located in the middle of the continu-

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argued that "every" referred to *every* non-ancillary restraint of trade and that all ancillary restraints of trade were to be measured by the rule of reason approach. (The non-ancillary—ancillary distinction was a common law fabrication differentiating between contracts ancillary to a lawful main purpose in the latter and contracts not ancilliary to a lawful main purpose in the former). Justice White, however, in *Standard Oil* argued that "every" means *every* and that the only question remaining was to identify the suspect conduct as an unreasonable restraint of trade. He thus contended that the rule of reason approach must be applied to all suspect conduct in order to determine if such was within the aegis of the Act. For the historical development of the rule of reason, see Bork, *Ancillary Restraints and the Sherman Act*, 15 A.B.A. ANTITRUST SECTION 211 (1959).

[2] *See* Board of Trade of the City of Chicago v. United States, 246 U.S. 231 (1918); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[3] 228 U.S. 1 (1911).

[4] Among these categories are: price fixing, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); group boycotts, Fashion Originators' Guild of America v. Federal Trade Comm'n, 312 U.S. 457 (1941); tying arrangements, International Salt Co. v. United States, 332 U.S. 392 (1947); horizontal market divisions, United States v. Topco Associates, Inc., 405 U.S. 596 (1972); and vertical market divisions, United States v. Arnold, Schwinn & Co., 388 U.S. 350 (1967).

um—would inevitably require a full scale market inquiry to determine its legality.[5]

The creation of per se unreasonable categories is the culmination of experience and analysis wherein it is ascertained that such conduct will be unreasonable;[6] that is, that the conduct involves such an anticompetitive purpose and effect as to outweigh any business justifications in an overwhelming proportion of its occurrences and can therefore be found to be illegal after mere identification. Justification is based on a cost benefit analysis that the gains in administrative ease, enhanced enforcement, and predictability far outweigh the advantages in identifying the market effects of such conduct in every case.[7] It should be noted, however, that this cost benefit rationale tacitly admits to overinclusiveness. Extensive criticism has thus been leveled at particularly questionable instances of application of the per se rule.[8] More criticism, however, has been leveled at the courts' efforts to circumvent the occasional injustices of the per se rule, thereby complicating and confusing the body of law accompanying the per se category.[9]

III. TYING ARRANGEMENTS AS A PER SE CATEGORY

A. *The Purpose and Effect of the Typical Tying Arrangement*

Tying arrangements have been recognized as per se violations of a number of the provisions of the federal antitrust laws.[10] The history of

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[5] Professor Richard Day of Ohio State University College of Law first presented the continuum approach to ascertaining the quantum of proof and market analysis required in assessing the legality of suspect conduct. *See* Day, *Exclusive Dealing, Tying and Reciprocity—A Reappraisal*, 29 OHIO ST. L.J. 539, 567 (1968).

[6] *See* United States v. Topco Associates, Inc., 405 U.S. 596 (1972).

[7] *See* United States v. Container Corp. of America, 393 U.S. 333, 341 (1969) (dissenting opinion).

[8] *See, e.g.*, Comment, *Horizontal Territorial Restraints and the Per Se Rule*, 28 WASH. & LEE L. REV. 457 (1971); Sadd, *Antitrust Symposium: Territorial and Customer Restrictions After Sealy and Schwinn*, 38 U. CIN. L. REV. 249 (1969).

[9] For criticism see Day, *supra* note 5. For seeming approval see Note, *Tying Arrangement and the Single Product Issue*, 31 OHIO ST. L.J. 861 (1970). For cases departing from the result expected from the application of the per se rule, see Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933). Within the tying field, see Dehydrating Process Co. v. A. O. Smith Corp, 292 F.2d 653 (1st Cir. 1961); United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (ED Pa 1960)

[10] The statutory bases for attacking tying arrangements are threefold. The first basis is § 3 of the Clayton Act, 15 U.S.C. § 14 (1970), which provides:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares . . . of a competitor or competitors of the lessor or seller,

their development as a per se category is interesting in itself.[11]

As indicated, the development of a per se rule initially required repeated examination of the purpose and effect of such conduct.[12] Thus, much of the momentum for reversing earlier case law establishing ties involving patented products as legal stemmed from the *belief* that such conduct was inherently an undue restraint of trade, which is to say that the purpose and effect of such conduct were inherently anticompetitive.[13]

The purpose of the traditional tie-in is to gain a competitive edge in a product market separate and distinct from the product market in which economic power already exists. This purpose, to attempt to foreclose competition by means other than those derived from normal competitive forces in the second product market, has been habitually condemned.[14]

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where the effect of such lease, sale . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

For a general discussion of the coverage of § 3, see 2 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 11.03 (1969).

The second basis is §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1970). Section 1 provides: "Every contract combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." Section 2 provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The third basis is § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1970), which in part provides that "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

[11] Initially tying arrangements involved patented tying commodities. *See* Note, *Tying Arrangements and the Single Product Defense*, 31 OHIO ST. L.J. 861, 862 (1970). These arrangements were originally declared legal due to the belief that a patent conferred upon the manufacturer not only the greater rights of exclusive production and distribution of the patented product but also the lesser right of determining in what manner and upon what conditions that patented product would be distributed. *See* Henry v. A. B. Dick Co., 224 U.S. 502 (1912). This favorable position enjoyed by patented tying arrangements was abolished, *see* Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917), and subsequently reversed such that currently patent ties are more likely to be found illegal than non-patent ties. *See* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969). *See also* Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).

[12] Board of Trade of the City of Chicago v. United States, 246 U.S 231 (1918). *See also* Day, *supra* note 5.

[13] Although not verbalized earlier, later tying cases have emphasized the inherently anticompetitive purpose and effect of such agreements. "However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable . . . ." Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). *See also* Siegel v. Chicken Delight, Inc., 448 F.2d 43, 47 (9th Cir. 1971); Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55, 60 (4th Cir. 1969). For a discussion of the development at the early patent tying cases, see note 11 *supra*.

[14] Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1968); Siegel v. Chicken Delight,

In order to evaluate the effects of tying arrangements, one must first understand how tying arrangements function. Such arrangements are commonly envisioned as one party's employment of market power derived from one product market (termed the tying product market) to restrict competition in a separate and distinct second product market (termed the tied product market).[15] This is accomplished by conditioning the sale of the desired tying product on the purchase of the tied product,[16] presumably less desirable to the purchaser than a competing product since otherwise the tie would be unnecessary.[17]

As described, a tie-in results in a restriction of competition, which has two components: "First, the buyer is prevented from seeking alternative sources of supply for the tied product; second, competing suppliers of the tied product are foreclosed from the market which is subject to the tying arrangement."[18] Although these components are theoretically interrelated, the courts will frequently focus attention merely upon one or the other depending usually upon the needs of the court. It appears that more often, however, emphasis is placed upon the foreclosure of competitors in the tied product market.[19] The gravamen of the courts' objection to the restrictive effects of the tying scheme is that the restriction is not the result of normal competitive forces but is instead the result of imaginative employment of economic leverage derived from a separate and distinct product market.[20]

Intimately tied to the purpose and effect of tying arrangements, as opposed to other exclusive arrangements, is the inference by the courts that coercion inherently exists.[21] Justice Clark noted that, "The *common*

Inc., 448 F.2d 43, 47 (9th Cir. 1971); Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55, 60 (4th Cir. 1969). *Cf.* International Salt Co. v. United States, 332 U.S. 392 (1947).

[15] *See generally* C. HILLS, ANTITRUST ADVISOR (1971); 2 J. VON KALINOWSKI, *supra* note 10. The "tying product" is the product desired by the purchasing party irrespective of the existence of a second product. The second product, presumably undesirable, is tied to the sale of the tying product and therefore is termed the "tied product."

[16] *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 330 (1962); Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55, 60 (4th Cir. 1969).

[17] Justice Black, speaking for the Court in Northern Pac. Ry. v. United States, 356 U.S. 1, 11 (1958), commented that: "of course if these restrictive provisions are merely harmless sieves with no tendency to restrain competition, as the defendant's argument seems to imply, it is hard to understand why it has expended so much effort in obtaining them in vast numbers or upholding their validity, or how they are of any benefit to anyone, even the defendant."

[18] Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55, 60 (4th Cir. 1969).

[19] *See, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 501 (1969).

[20] Siegel v. Chicken Delight, Inc., 448 F.2d 43, 47 (9th Cir. 1971).

[21] The distinguishing feature of tying arrangements in comparison to the body of exclu-

core of the adjudicated unlawful tying arrangements is the *forced* purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product . . . ."[22] Thus the courts tend to presume that a tying arrangement is not in the mutual interests of both parties but is instead *forced* upon the purchasing party.[23]

It is this presumed element of coercion in the tying arrangement which must have spurred the courts to treat two very similar categories of conduct, tying arrangements and exclusive dealing arrangements, in radically different ways: per se treatment in the former and not in the latter. Thus, if tying arrangements were considered to be mutually beneficial to both the purchasing and tie-imposing parties, a significant under-

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sive arrangements is the element of coercion. Lessig v. Tidewater Oil Co., 327 F.2d 459, 469 n.22 (9th Cir. 1964). The Supreme Court in Brown Shoe Co. v. United States, 370 U.S. 294, 330 (1962), noted that:

> The usual tying contract forces the customer to take a product or brand he does not necessarily want in order to secure one which he does desire. . . . on the other hand, requirement contracts are frequently negotiated at the behest of the customer who has chosen the particular supplier and his product upon the basis of competitive merit.

The question of when coercion is deemed to exist is considerably more complex. In Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55, 62 (4th Cir. 1969), which involved the alleged tying of sales of electrostatic copying paper to defendant's copy machines, service contracts, warranties and supplies, the court intimated that tying arrangements are non-coercive, and therefore legal, only if the components are separately available to the customer on a basis as favorable as the tie-in basis. Thus in those cases where the tied product is not a forced purchase via direct or indirect coercion, a tying arrangement has been held not to exist.

However, in Federal Trade Comm'n v. Texaco, Inc., 393 U.S. 223 (1968), it was held that *indirect* coercion will suffice to constitute an illegal tying arrangement. *Texaco* involved the alleged tying of Goodrich accessories to the Texaco dealership, as a result of which Texaco received a commission from Goodrich for consequent sales. The Court held that the system of lease distribution necessitated prospective or existing lessees to maintain the goodwill of Texaco and Texaco salesmen. Due to this dependency, the Court concluded that indirect coercion was employed, thereby constituting an illegal tying arrangement.

On the other hand, Abercrombie v. Lum's Inc., 345 F. Supp. 387 (S.D. Fla. 1972), noted that "mere persuasion," as opposed to actual coercion, was insufficient to constitute an illegal tying arrangement. *Abercrombie* involved the tie of furniture and fixtures to the grant of a Lum's franchise.

Moreover, there appears to be some indication that where the *entire* arrangement is attractive so that the buyer is not coerced but *enticed* into the purchase of the tied product it will not constitute an illegal tying arrangement under traditional theory. Cities Service Oil Co. v. Coleman Oil Co., 470 F.2d 925 (1st Cir. 1972). *Cities Service* noted that, "Rather than being a coercive tying arrangement, the business relationship before us would appear to represent a rational and mutually profitable scheme for the development of service station sites." *Id.* at 930.

One authority, however, has suggested that regardless of the absence of the coercive element the anticompetitive effect is identical, and consequently should constitute illegal practice. M. HANDLER, *Antitrust: 1969*, in TWENTY-FIVE YEARS OF ANTITRUST 801 (1973).

[22] Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 614 (1953).

[23] See note 17 *supra*.

pinning of the courts' objection to the restrictive effect of tying arrangements would be largely removed.[24]

B. *Triggering the Per Se Rule for Tying Arrangements*

An initial requirement for triggering the per se rule for tying arrangements entails the determination that more than a single product is involved in the arrangement.[25] If but a single product is involved then a defense (appropriately termed the "single product defense")[26] is raised. The defense goes to the non-existence of a tie, there being but a single product, and therefore the inappropriateness of not only tying theory but its accompanying per se characterization. Thus, if it is shown that the alleged tied product is an essential and integral part of the alleged tying product, the averred two products are in reality a single product which of necessity can and should be sold as a unit.[27]

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[24] Some argue that Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), was just such a case. In *Northern Pacific* "preferred routing clauses," requiring the lessee or purchaser to ship his products via Northern Pacific Railway, were tied to the lease or sale of land bordering the railway. Inspection of the facts makes it difficult to believe, in light of the proximity of the purchasers and lessees to the railway, that any bettter arrangement could have been made for the transportation of their goods. Thus the arrangement would appear to have been in the parties' mutual interest. However, the Supreme Court presumed coercion, thereby sidestepping the issue. *Id.* at 11.

[25] Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 507 (1969). *See also* Siegel v. Chicken Delight, Inc., 448 F.2d 43, 47 (9th Cir. 1971); Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55, 60 (4th Cir. 1969). This prerequisite is a product of the form of tying arrangements as opposed to an indication of an arrangement identical to tying arrangements in substance and, therefore, within the tying category. See notes 66 through 74 and accompanying text *infra.*

[26] *See, e.g.*, Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653 (1st Cir. 1961); United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960). Later it will be indicated that in reality two separate and distinct *product markets* are required, as opposed to merely two separate and distinct *products*. *See* notes 66 through 74 and accompanying text *infra*. *See also* Note, *Tying Arrangements and the Single Product Issue*, 31 OHIO ST. L.J. 861 (1970).

[27] It can be argued that the few recognized defenses to tying arrangement prohibitions are inherently a part of the single product defense. United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), has been interpreted to have held that "when there are sound economic reasons for a challenged tying arrangement, the product may be treated as one rather than several." C. HILLS, *supra* note 15, § 3.15, at 91.

> Following *Jerrold*, therefore, it was clear that two products would be viewed as one for antitrust purposes if economic considerations justified unit sales. *Jerrold* also demonstrated that there is nothing sacred about two items being called one product or two; the same two items can be one legal product at one time and two at another. Indeed, broadly read, *Jerrold* completely overturns the per se rule against tie-ins. The only difference between what the *Jerrold* court did and the "rule of reason" inquiry into economic effects is that the court in *Jerrold* asked whether there was any reason to treat two products as one, rather than asking the direct question whether there was any reason to hold the tie-in illegal.

Wheeler, *Some Observations on Tie-Ins, the Single-Product Defense, Exclusive Dealing and Regulated Industries*, 60 CALIF. L. REV. 1557, 1561 (1972). *See also* Note, *Tying Arrangements and the Single Product Issue*, 31 OHIO ST. L.J. 861, 868 (1970).

In addition to the single product defense, two prerequisites to the establishment of per se illegality were identified early in the development of tying theory. These are: (1) whether or not sufficient market power existed over the tying product; and (2) whether or not a "not insubstantial" amount of commerce in the tied product market was affected.[28] These two prerequisites are the subject of controversy and the cause of extensive criticism.[29] One focus of the controversy is whether one or both requirements are necessary to trigger the per se rule for tying arrangements.

This controversy stems from the alleged delineation between the Sherman Act and Clayton Act standards of per se illegality. Originally it was formulated that to establish a per se Clayton Act violation under tying theory *either* of these two prerequisites was sufficient, but to establish per se illegality under the Sherman Act *both* were required.[30] Thus whether one or both of these prerequisites was required was contingent upon the statute selected for enforcement. Since these statutes had different limitations as to their coverage, essentially equivalent conduct was treated inequitably.[31]

Case law development has moved in the direction of eradicating this distinction.[32] In fact, *Fortner Enterprises v. United States Steel Corp.*,[33]

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[28] *See* Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).

[29] *See generally* C. HILLS, *supra* note 15; 2 J. VON KALINOWSKI, *supra* note 10.

[30] Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 608-09 (1953).

[31] This dichotomy in standards has been severly criticized. M. HANDLER, *supra* note 21 at 794. Since Clayton is directed at specific violations within the more general and comprehensive coverage of Sherman, an implication arises that in those areas covered by Clayton a pre-emption was envisioned. Likewise, in those areas not within the purview of Clayton it could be argued that Congress did not intend for the lesser Clayton standards to be applied. This, however, seems illogical unless a rationale can be promulgated justifying harsher standards for identical conduct only involving land as a tying product, for example, as opposed to commodities.

[32] It might be argued that the distinction between the two Acts established by Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953), was *implicitly* abolished as early as 1953 in Northern Pac. Ry v. United States, 356 U.S. 1 (1958).

> The Court did not indicate the degree to which competition in transportation was foreclosed, the number of railroads, if any, that competed with Northern in servicing the land. . . . [T]he conspicuous absence of proof of any of these questions . . . suggests that the Court both majority and dissent, considered the only material issue to be one of "sufficient economic power" to impose the tying restriction. Minimally this would amount to eliminating, sub silentio, the *Times-Picayune* distinction between the Clayton and Sherman Act tests for tying.

Day, *supra* note 5, at 544. Justice Fortas dissenting in Fortner Enterprises v. United States Steel Corp., 394 U.S. 495, 521 (1969), noted that, "*Northern Pacific*, in effect applied the same standards to tying arrangements under the Sherman Act as under the Clayton Act, on the theory that the anticompetitive effect of a tie-in was such as to make the difference in language in the statutes immaterial."

More recently, Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969), again in a Sherman § 1 suit, held the suspect tying conduct illegal solely upon the determination that "sufficient economic power" existed in tht tying product market.

has been heralded as sounding the death knell of the distinction.[34] However, careful scrutiny reveals that the dichotomy has been retained, at least formally.[35] Yet, as will be indicated later, despite this formal retention of the distinction, a readily apparent trend to more leniently define these prerequisites, concomitant with an ever increasing number of presumptions of their existence, provides for their easy circumvention.[36]

A second underlying controversy directed at the normality of the tying arrangement per se rule exists over whether the above two prerequisites are prerequisites to the identification of the conduct as a tying arrangement or whether given the existence of the tying arrangement they are instead prerequisites merely to the triggering of the per se rule.[37] If the former is the correct interpretation, then tying arrangements conform to the traditional and theoretically correct view of per se rules. This is to say that once identified as coming within the per se category the conduct is deemed illegal without further inquiry.[38] If the latter is the correct interpretation then more is required than mere identification of the conduct as within the per se category and therefore it does *not* conform to the normal conception of a per se rule. In this latter situa-

The court did not seek to establish that a "not insubstantial" amount of commerce was affected in the tied product market. 2 J. VON KALINOWSKI, *supra* note 10, § 14.03 [2], at 102-03.

[33] 394 U.S. 495 (1969).

[34] Commentators have proclaimed that "[t]he Supreme Court . . . has erased almost all practical distinction between the requirements of the economic power and of the not insubstantial amount of commerce standards." 9 J. VON KALINOWSKI, *supra* note 10, § 64.05 [2], at 64-90. *See* M. HANDLER, *supra* note 21, at 793. Although this differs from saying that the dichotomy in the Sherman Act and Clayton Act standards is abolished, the distinction is without a difference since if the two requisites for establishing per se illegality are met, then but one requirement exists, regardless of what label is attached to it.

[35] Although finding a "not insubstantial" amount of commerce affected, the Court was unable to find a presumption of "sufficient economic power." Having failed to satisfy both prerequisites (see text accompanying notes 75 through 107 *infra* for a more detailed discussion of these two prerequisites) the case was remanded. "Under these circumstances the pleadings and affidavits sufficiently disclose the possibility of market power over borrowers in the credit market to entitle petitioner to go to trial on this issue." Fortner Enterprises v. United States Steel Corp., 394 U.S. 495, 506 (1969).

[36] See text accompanying notes 75 through 107 *infra.*

[37] The resolution of this controversy centers upon ascertaining the definition of a tying arrangement. If the more common notion is accepted, that is, that a simple conditioning of the sale of one product on the sale of a second is a tying arrangement, then clearly tying arrangements exist which are not illegal. The per se label in this instance would appear to be inappropriate.

On the other hand, the antitrust definition of a tying arrangement may be considerably different. Thus, as indicated, the ingredient of coercion seems to be an element inferred in the existence of a tying arrangement. See text accompanying notes 21 through 23 *supra.* Therefore, without "sufficient economic power" in the tying product market, coercion to impose the tie cannot exist and thus, in antitrust terms, a tying arrangement does not exist. Likewise the "not insubstantial amount" of commerce prerequisite can be seen as a practical and constitutional prerequisite to antitrust enforcement.

[38] *See* text accompanying notes 4 and 5 *supra.*

tion a legitimate question arises concerning the appropriateness of the per se classification of tying arrangements. Application of the per se label, if in fact the arrangements are not per se unreasonable, tends to confuse and complicate at the expense of justice.

IV. THE "TIE-OUT" DEVELOPMENT

A. *Introduction—An Attempt to Classify Within the Traditional Framework*

The term "tie-in" should be understood as a label attached merely to a particular form of tying arrangement. The situation commonly conceived is that involving the tying-in of the sale of a second product (tied product) to the sale of a first product (tying product). In fact, however, extensive development has occurred with respect to the form of tying arrangements[39] and indication has been that further development is in store.[40]

The "tie-out" form was conceived in reference to the recently developed area of shopping center restrictive covenants.[41] Two different "tie-out" arrangements exist: (1) the relationship between the preferred tenant[42] and the developer; and (2) the relationship between the preferred tenant and a satellite tenant.[43] The usual approach has been to view the shopping center arrangement from the preferred tenant-developer relationship.[44] This relationship results in the preferred tenant securing any of a number of covenants in his lease provision,[45] all of which to some extent have the effect of restricting competition.[46] The natural proclivity of enforcement agencies has been to attempt to categorize such

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[39] *See* text accompanying notes 108 through 112 *infra.*

[40] *See* Day, *supra* note 5.

[41] For discussion of the shopping center area generally see Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 86 HARV. L. REV. 1201 (1973); Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 18 VILL. L. REV. 721 (1973).

[42] The term "preferred tenant" is used to describe the larger tenant whose tenancy is desired by the developer due to the drawing power and financing significance of this type of tenant.

[43] The term "satellite tenant" refers to the smaller tenant who does not occupy the favored status of the preferred tenant and who, as opposed to being actively sought by the developer, instead actively seeks a location within the center. See note 57 *infra.*

[44] *See* Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 86 HARV. L. REV. 1201 (1973); Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 18 VILL. L. REV. 721 (1973).

[45] Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 86 HARV. L. REV. 1201, 1204 (1973).

[46] *Id.* at 1207.

conduct as within one of the per se offenses.[47] These efforts have been largely unsuccessful to date.[48]

One attempted approach has been to classify the conduct as a traditional tying arrangement.[49] Advocates of this approach argue that the preferred tenant is essentially selling his tenancy to the center and in doing so sells along with it an anticompetitive covenant. The first product, tenancy, exists within the broad market for preferred shopping center tenants. The alleged second product, the anticompetitive covenant, deals with a separate and distinct product market, the sale of particular products marketed by the preferred tenant. The obvious departure from traditional tie-in theory is that the alleged second product is *not* a *product* in a second product market (*e.g.*, the required purchase of salt as a condition to the purchase of the patented "Saltomat"[50]) tied to a first product. Instead the alleged second product is a *device* for restricting competition in the second product market. Thus criticism has been leveled at applications of the traditional tie-in approach.[51] Unfortunately this criticism stops with the mere indication that "it doesn't quite fit." It is submitted, however, that there is more to the application of tying theory than the recurrence of a particular form.[52] Thus, where the purposes, effects, and basic structures are identical, a slightly deviant form should not preclude identification of the conduct as really but a slight variation of a single category."[53]

The second approach, the preferred tenant—satellite tenant relationship, has received little attention under traditional tie-in theory. In the

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[47] *See, e.g.*, Dalmo Sales Co. v. Tysons Corner Regional Shopping Center, 308 F. Supp. 988 (D.D.C.), *aff'd*, 429 F.2d 206 (D.C. Cir. 1970); Savon Gas Stations Number Six, Inc. v. Shell Oil Co., 309 F.2d 306 (4th Cir. 1962), *cert. denied*, 372 U.S 911 (1963); Plum Tree, Inc. v. N. K. Winston Corp, 351 F. Supp. 80 (S.D.N.Y. 1972). *See also, The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 86 HARV. L. REV. 1201 (1973); Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 18 VILL. L. REV. 721 (1973).

[48] *Id.*

[49] *See* Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 86 HARV. L. REV. 1201, 1217 n.70 (1973).

[50] *See* International Salt Co. v. United States, 332 U.S. 392 (1947).

[51] Thus, for example, it is argued that tie-in theory is inappropriate in this situation since (1) the tied and tying products were not both being purchased by the same party and (2) the alleged tied product is not a separate product in relation to the tying product, but rather, a condition of the alleged tying product defining the relative rights and duties of the respective parties. Critics conclude that if the condition were deemed to constitute part of an illegal tying arrangement then all conditions of leases would take on a similar character, an alleged unseeming result. Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 86 HARV. L. REV. 1201, 1217 n.70 (1973).

[52] As one commentator put it, "Some generally accepted antitrust theories may need reevaluation before the courts apply them in this situation." Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 18 VILL. L. REV. 721 (1973).

[53] *See* notes 108 through 112 and accompanying text *infra*.

next section examination will be made of both of these approaches under "tie-out" theory.

B. *The Mechanics of the "Tie-out" Approach*

1. Introduction

Superficially, delineation may be made between the traditional tying arrangement and a "tie-out." In form, the traditional tying arrangement achieves a *restriction* of competition in a second product market by means of an arrangement tying two separate and distinct products together.[54] In a "tie-out," on the other hand, the second product, as the instrument tied to the first product to complete the successful imposition of economic leverage derived from the first product market, is *eliminated.* This is not to say that there is any lessening in the desire of the tie-imposing party to direct anticompetitive practices toward the second product market. It merely indicates that successful employment of the economic lever derived from the first product market may be accomplished in a somewhat different *form.* Thus in the "tie-out" the lever of economic power derived from the first product market is employed to procure, either directly or through covenants and conditions, an agreement restricting competition in the second product market without need of the interposition of the tie-in of the second product (tied product).

The reason for the resulting difference in form of the two arrangements stems from the difference in the nature of the purchasing parties in the two situations. Tie-ins occur when the purchasing party (1) seeks to purchase the tying product from the tie-imposing party, and (2) is a purchaser of a separate and distinct second product which the tie-imposing party also supplies. On the other hand, "tie-outs" arise where the purchasing party (1) seeks to purchase the tying product from the tie-imposing party, and (2) is either a competitor with the tie-imposing party in a separate and distinct product market or, alternatively, is in a position to control competing suppliers in a second product market. The tie-imposing party clearly cannot expect acquiescence in an arrangement whereby the purchasing party must purchase not only the product it desires but likewise a second product which the *purchasing party likewise supplies.* However, the tie-imposing party may achieve a restriction of competition in this second product market by using its economic lever to procure an agreement of lessened competition on the part of the pur-

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[54] *See, e.g.,* International Salt Co. v. United States, 332 U.S. 392 (1947); Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971); Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969).

chasing party or those within his control. The arrangement culminates in a tying-out of competition in the second product market.

The shopping center situation, having spawned the "tie-out" concept, serves as a good illustration. Viewed from the preferred tenant—developer relationship, the preferred tenant offers his tenancy to the developer who in turn has been actively seeking it.[55] Due to the desirability of his tenancy, the preferred tenant has acquired an economic lever which may be employed to restrict competition in a separate and distinct product market. If, fortuitously, the developer were a purchaser within the second product market, then the preferred tenant through the *normal tying mechanism* could restrict competition by tying the developer's purchases of the hypothetical second product to his purchases of the desired first product (the preferred tenant's tenancy). More realistically, the developer is not a purchaser of products in a second product market supplied by the preferred tenant. The developer, however, does exercise control over the admission of satellites into the center. These satellites are potential competitors with the preferred tenant in the sale of products in a separate and distinct second product market (*e.g.*, the sale of women's fashion clothing). With this knowledge, the preferred tenant employs the desirability of his tenancy, to procure an agreement from the developer to restrict or regulate potential competitors in the second product market.[56] The bottom-line of all this is that the preferred tenant has, as in the normal tying arrangement, successfully tied-out competition, at least marginally, in a second product market by employing leverage derived from a separate and distinct product market.

The shopping center situation may also be viewed from the preferred tenant—satellite tenant relationship. Viewed in this way, the situation is one in which the purchasing party is a competitor with the preferred tenant as opposed to one who controls such competitors. Notably, the "tie-out" in this circumstance arises *subsequent* to the acquisition by the preferred tenant of some power or control over the leasing of available satellite space. Such a veto or controlling power, whether explicit or implicit, in substance means that a prospective satellite tenant must bargain with the perferred tenant in order to obtain the desired shopping center space. Moreover, it should be recognized that such space is actively sought and desired by prospective satellite tenants.[57]

The preferred tenant by exercising control over satellite tenancy, ac-

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[55] *See* Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 86 HARV. L. REV. 1201, 1205 (1973).

[56] *See* note 46 and accompanying text *supra*.

[57] *See* Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 86 HARV. L. REV. 1201, 1208 (1973).

quires leverage which may be employed not to tie-in the sale of a second product but to procure an agreement from the satellite tenant of lessened competition in a second product market. Thus, if the prospective satellite tenant desires space within the center he must agree to refrain from selling, for example, women's fashion clothing in competition with the preferred tenant and instead content himself with the sale of lower priced women's clothing or some other non-competitive products.[58]

Here, as in the preferred tenant—developer situation and the traditional tie-in, the tie-imposing party has achieved a restriction of competition in a second product market by the effective use of leverage derived from a separate and distinct product market. In substance the arrangements are indistinguishable.

2. Purpose and Effect

As heretofore indicated, critical to the development of tying theory as a per se category is the belief that its purpose and effect are inherently anticompetitive. The purpose and effect of the "tie-out" are virtually indistinguishable from that of the tie-in. The normal tie-in restricts competition in the second product market by eliminating the purchasing party from the market of potential buyers. As indicated,[59] the effect of this restriction has two components: (1) a foreclosure of choice for the purchasing party as to prospective suppliers; and (2) a foreclosure of competing suppliers from the potential sale of the second product to the purchasing party. As noted,[60] the practice is condemned because the resulting foreclosure is not the result of competitive forces in the second product market.

The "tie-out," in juxtaposition, restricts competition in the second produce market by eliminating *competing suppliers* from the market of prospective suppliers. In this situation in which the competitor is *also* the purchasing party, the two components of the effect of a tie-in described above are merged. Thus, the purchasing party is foreclosed in his choice of potential buyers whom he may supply, which is also to say that he is forclosed from competing with the preferred tenant in the supply of products within the second product market.

The "tie-out," as with the tie-in, has the purpose of achieving a competitive edge in the second product market through employment of eco-

[58] Clearly myriad variations on this theme could be attained. The essential ingredient, however, is the use of this economic leverage derived from the preferred tenant's control of satellite space to, in some way, restrict competitiion in a second and unrelated product market.

[59] *See* note 18 and accompanying text *supra.*

[60] *See* note 20 and accompanying text *supra.*

nomic power derived from a separate and distinct product market. As with the tie-in, the practice is not the result of competitive efficiency and should therefore earn like condemnation. As heretofore indicated,[61] the accomplishment of this objective through the employment of a coercive lever distinguishes tying arrangements from the broad category of exclusive arrangements. "Tie-outs," even more blatantly and directly than tie-ins, involve this coercive element, thus setting themselves apart from the other forms of exclusive arrangements.[62]

The basic tool for ascertaining the characterization and illegality of any conduct is the examination of the purpose and effects of such conduct.[63] In light of the purpose and effect of the "tie-out" scheme there is little doubt that it fits comfortably within the traditional body of tying theory.

3. The Triggering of the Per Se Rule

a. Introduction

This portion of the note is important not only in understanding the mechanisms of the traditional tying theory and how "tie-outs" fit within this scheme, but also in bringing to the forefront the fundamental questions concerning the appropriateness of the per se rule. If, as will be seen, "tie-outs" conform to the existing mechanistic framework of tying arrangements, then not only thoretically, as heretofore indicated,[64] but likewise mechanically, "tie-outs" are deserving of the per se categorization.[65]

Initial examination will be made of the applicability of the single

[61] *See* notes 21 through 23 and accompanying text *supra.*

[62] Considering the nature of the "tie-out" arrangement, it is highly unlikely that "mere persuasion" as in Abercombie v. Lum's Inc., 345 F. Supp. 387 (S.D. Fla. 1972) (see note 21 *supra*), could entice a competitor to abate sales of common marketed goods, even in a limited area. Likewise a non-reciprocal specification of the non-sale of competing products would seldom constitute a "rational and *mutually* profitable scheme." Thus it would seem apparent that due to the nature of the "tie-out" the element of coercion is even more pronounced than in the typical tying arrangement.

The element of coercion would likewise seem apparent in the preferred tenant—developer relationship. "Since the exclusionary covenants restrict a developer's freedom of choice, it would not appear to be in his self-interest to grant them." Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 86 HARV. L. REV. 1201, 1205 (1973).

[63] *See* notes 2 through 6 and accompanying text *supra.*

[64] *See* notes 59 through 63 and accompanying text *supra.*

[65] This is to say that if certain characteristics are believed to be necessary and exclusive to obtain a certain legal result then all arrangements having such characteristics must lead to that same legal result. To deny this legal result to an arrangement having the necessary characteristics is to intimate that either additional characteristics are needed or certain characteristics must be absent. In either event there is an admission that the identified characteristics are either not exclusive or erroneous.

product defense to the "tie-out" situation. Critical to its application will be a recognition that the defense is currently envisioned in terms of the *form* of the traditional tie-in. Since the defense is a valid defense in determining the existence of a tie, it must be applied in substance as opposed to in form.

Following consideration of the single product defense, the question must be considered whether "tie-outs" meet the alleged two prerequisites ("sufficient economic power" and the "not insubstantial" amount of commerce) necessary to the triggering of the per se rule. This will require an initial determination of which of the alleged prerequisites are in fact prerequisites necessary for a finding of illegality as opposed to constructions reflecting the mere *form* of the traditional tying arrangement. Moreover, examination is necessary to determine whether, in light of recent development in tying theory, all the alleged prerequisites established must in fact be met to trigger the per se rule.

b. The single product defense

As tying arrangements are currently viewed, the single product defense is well suited for an accurate assessment of the existence of a tying arrangement. The defense is adaptable to the substance of tying theory and often is implicitly so viewed. Thus it is not critical that two separate and distinct *products* exist but instead that two separate and distinct product *markets* exist. Development has already occurred indicating that a departure from the two product conception of tying arrangements has begun.[66] Likewise if one views this requirement as a mechanism to establish the reasonableness of the tie, as opposed to its existence in form only, then even more clearly the defense is founded upon a determination of the existence of two product markets as opposed to two products.[67]

Examination of the cases interpreting the single product defense lends credence to the above view. *Times-Picayune Publishing Co. v. United States*[68] involved the alleged tie of advertisements in a newspaper's evening edition to advertisements in its more popular morning edition. The decision, upholding the validity of the tie, has been extensively criticized and subsequent cases have noted that the "Court was extremely careful

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[66] *See* notes 108 through 112 and accompanying text *infra.*

[67] By a mechanism to establish the reasonableness of the tie, reference is made to the use of the single product defense as an escape valve for those arrangements containing reasonable business justifications. See note 27 *supra.* "Determination that a single product has been sold is a useful tool for exempting certain transactions that are supported by legitimate business considerations from the harsh application of *Northern Pacific Railway.*" Note, *Tying Arrangements and the Single Product Issue,* 31 OHIO ST. L.J. 861, 868 (1970).

[68] 345 U.S. 594 (1953).

to confine its decision to the narrow record before it."[69] Resistance to the decision seems to stem from observers' continued insistence on viewing tying arrangements merely in a *two commodity* tie-in sense. Justice Clark, however, in delivering the opinion of the Court, indicated that "no leverage in *one market* excludes sellers in *the second*, because for present purposes the products are identical and *the market the same*."[70] The alleged market to which the Court refers is the "readership" market, which, from an assumption of identical customer coverage for the two editions, the Court concludes is but a single market purchased by advertisers.[71]

What some view as more liberal interpretations of the single product requirement have more recently arisen. In *Fortner Enterprises Inc. v. United States Steel Corp.*,[72] the Supreme Court held that credit offered by a subsidiary of United States Steel Corporation was a separate and distinct product from the prefabricated homes sold by United States Steel and tied to the credit availability.[73] Although indefinite as to any precise standard, Justice Black indicated that the existence of two allegedly different corporations and the fact that the credit offered was far in excess of the purchase price of the prefabricated homes substantiated the Court's belief that two separate and distinct products in fact existed.[74] Again it seems as though the question turned upon whether a separate and distinct *market* existed for the credit offered by the subsidiary or whether such was merely an offering to finance the sale of United States Steel's prefabricated homes.

"Tie-outs" clearly encounter difficulties if the single product defense is perpetuated in terms of the existence of a *two product* tie-in. However, if the defense is viewed, as this author believes implicitly it is, as

[69] Northern Pac. Ry. v. United States, 356 U.S. 1, 10 (1958).

[70] 345 U.S. at 614 (emphasis added).

[71] *Id.* at 613.

[72] 394 U.S. 495 (1969).

[73] The decision spawned criticism, chiefly arguing that the availability of the credit was primarily to facilitate the sale of the prefabricated homes, thereby much like the normal sale on credit transaction. As the majority in *Fortner* argued, however, the situation differed significantly from the typical sale on credit:

> In the usual sale on credit the seller, a single individual or corporation, simply makes an agreement determining when and how much will be paid for his product. In such a sale the credit may constitute such an inseparable part of the purchase price for the item that the entire transaction could be considered to involve only a single product. . . . Sales such as that are a far cry from the arrangement involved here where the credit is provided by one corporation on condition that a product be purchased from a separate corporation, and where the borrower contracts to obtain a large sum of money over and above that needed to pay the seller for the physical products purchased.

Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 507 (1969).

[74] *Id.*

requiring two separate and distinct product *markets*, then "tie-outs" are as capable as normal tie-ins of satisfying the prerequisite. The reason is that "tie-outs" contain the basic element of all tying arrangements—employment of an economic lever derived from power within one market to restrict competition in a separate and distinct market.

c. The "sufficient economic power" prerequisite

As previously indicated,[75] there is some question whether the two remaining alleged prerequisites, the existence of "sufficient economic power" over the tying product and a "not insubstantial" amount of commerce affected in the tied product, must both be satisfied in order to trigger the application of the per se rule. Moreover, as was noted,[76] it may be argued that neither is in reality a prerequisite to the existence of a tying arrangement, thereby raising a question as to the legitimacy of the per se classification of tying arrangements. "Tie-outs" may aggravate this legitimacy question if the courts are reluctant to classify them as per se offenses although unable to demonstrate their noncompliance with the mechanical or theoretical requirements of tying theory.[77]

Even if the "sufficient economic power" prerequisite must be satisfied for the establishment of a per se violation,[78] a trend toward more lenient definition of the requisite economic power and an ever widening field of acknowledged factors giving rise to a presumption of sufficient economic power in the tying product market have rendered this prerequisite an easily surmountable obstacle.[79]

In looking to the "sufficient economic power" prerequisite, it has been frequently recognized that if there is "no control or dominance over the tying product so that it does not represent an effectual weapon to pressure

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[75] *See* notes 30 through 36 and accompanying text *supra.*

[76] *See* notes 37 and 38 and accompanying text *supra.*

[77] The ingenuity of the courts in creating artificial distinctions is beyond dispute. However, we must assume that only substantive distinctions will be attempted and recognize those distinctions which merely perpetuate the already problematical area of tying arrangements as a per se category.

[78] We are concerned here with not only the question of the legitimacy of the application of the per se label and the leniency of the definition of the "sufficient economic power" prerequisite, but additionally with the dichotomy question concerning whether both the "sufficient economic power" prerequisite and the "not insubstantial" amount of commerce prerequisite must be established for suits brought under both the Sherman Act and the Clayton Act.

[79] "By a process of evolution the Court has, thus, liberalized the economic power standard, once requiring 'market dominance,' but later declaring that a mere inference from the 'desirability' or 'uniqueness' of the product is sufficient." Note, *Antitrust Per Se Doctrine—Tying Arrangement and the Market Power Requirement*, 8 TULSA L.J. 235, 238 (1972). *See also* M. HANDLER, *supra* note 21, at 796-98.

buyers into taking the tied item, any restraint attributable to such tying arrangements would obviously be insignificant at most."[80]

It is equally well acknowledged that no longer is monopoly power or power approaching dominance required to establish a per se violation. "Until 1958 . . . the courts spoke in terms of monopoly power and/or dominant sellers. . . ."[81] *Northern Pacific Railway v. United States*[82] severely tempered this early standard explaining that, "we do not construe this general language [of *Times-Picayune Publishing Co. v. United States*[83]] as requiring anything more than *sufficient economic power* to impose an appreciable restraint on free competition in the tied product. . . ." Subsequent cases have continued to leniently define the requisite economic power.[84]

The "tie-out" approach, in form as well as substance, does not alter traditional tying theory with respect to what constitutes a tying product. Likewise, it would leave unaltered the determination of how much economic power is required with respect to the tying product to constitute a per se illegal tying arrangement. Thus with the "tie-out" approach, "sufficient economic power" over the tying product would still be required.[85] For example, in the shopping center "tie-out" arrangement a showing is required of sufficient economic power in the hands of the

[80] Northern Pac. Ry. v. United States, 356 U.S. 1, 6 (1958). In Cities Service Oil Co. v. Coleman Oil Co., 470 F.2d 925, 930 (1st Cir. 1972), it was held that failure to show any market power whatever in the tying product was fatal to the argument that a per se violation existed. The averred tying product, allegedly employed to procure exclusive outlets for the purchase of Cities' petroleum products, was the extension of credit in conjunction with the distribution of service station leases. As *Cities Service* demonstrates, some showing of market power in the tying product market is still required to find the suspect conduct per se illegal.

[81] 9 J. VON KALINOWSKI, *supra* note 10, § 64.05 [2] [c], at 64-80.

[82] 356 U.S. 1, 11 (1958) (emphasis added).

[83] 345 U.S. 594 (1953).

[84] It may be safely concluded that very little is required to establish that a seller who employs a tying arrangement has "suffiient economic power" with respect to the tying product to restrain a "substantial" amount of commerce in the market for the tied product. Indeed, in view of the recent cases one may reasonably doubt that an effective tying arrangement could exist in which "sufficient economic power" is lacking, even absent a patent or copyright.
C. HILLS, *supra* note 15, § 3.14, at 89. *See also*, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969); Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969).

[85] As indicated above, text accompanying notes 21 through 23 *supra*, the "sufficient economic power" prerequisite is interwoven with the element of coercion. Thus without "sufficient economic power" it would be difficult to conclude the tying arrangement had been forced upon the purchasing party. The "tie-out" in being effective by directly tying-out competition is even more likely to involve coercion than the tie-in. The reason is that whereas "tie-outs" can completely eliminate the purchasing party's sales of competing products, the tie-in can only require the purchasing party to buy a certain amount of the second product from the tie-imposing party, leaving the purchasing party the ability to seek his additional requirements of the second product from competitors. *See* note 62 *supra*.

preferred tenant either over the product of his tenancy, in the preferred tenant—developer arrangement, or over the distribution of satellite space within the center, in the preferred tenant—satellite tenant arrangement.

In addition to the lessening requirements of economic power over the tying product, litigation has prompted the evolution of recognized presumptions of "sufficient economic power." Thus it has been held that patented or copyrighted tying products[86] or even the mere desirability[87] or uniqueness[88] of a tying product may allow a presumption of "sufficient economic power" to arise. In this latter situation Justice Black, writing for the Court in *Fortner*, noted:

> Uniqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves. Such barriers may be legal, as in the case of patented and copyrighted products, e.g. *International Salt*; *Loew's*, or physical, as when the product is land, e.g. *Northern Pacific*. It is true that the barriers may also be economic, as when competitors are simply unable to produce the distinctive product profitably, but the uniqueness test in such situations is somewhat confusing since the real source of economic power is not the product itself but, rather the seller's cost advantage in producing it.[89]

Shopping center "tie-outs" may fit within a number of these recognized presumptions of "sufficient economic power." In the preferred tenant—developer situation the tying product is the tenancy of the preferred tenant. As heretofore indicated,[90] the tenancy of the preferred tenant is highly desired by the developer due to its economic significance to the success of the center. Moreover, an economic barrier exists preventing the satellite tenant from acquiring like status with respect to the product of its tenancy. In contrast to a number of other foreseeable situations, it can be argued that the economic superiority enjoyed by the preferred tenant with respect to his tenancy is not as much the product of competitive efficiency as it is the product of historical perpetuation.[91]

In the preferred tenant—satellite tenant situation, the tying product

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[86] Siegel v. Chicken Delight, Inc., 448 F.2d 43, 50 (9th Cir. 1971).

[87] United States v. Loew's Inc., 371 U.S. 38 (1962). *See* M. HANDLER, *supra* note 21, at 794-95.

[88] Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 505 n.2 (1969). *Fortner* seems to employ the term "uniqueness" as a more generic term embodying all the other previously recognized presumptions.

[89] *Id.*

[90] *See* Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 86 HARV. L. REV. 1201, 1205 (1973).

[91] This is to say that the preferred tenant has attained his size and reputation through the years. Thus he becomes preferred over other tenants due to this historic development, not necessarily due to any present great economic efficiency as was feared by Justice Black in *Fortner*. On the other hand, one could likewise argue that it was the economic efficiency of the preferred tenant which elevated the tenant to a position of superiority.

is satellite space within the center. This satellite space, due to its location and attractiveness to customers, may be deemed to constitute a unique and highly desirable product,[92] thereby giving rise to a presumption of sufficient economic power. Moreover, control of the leasing of such space parallels the situation in *Northern Pacific Railway v. United States*[93] and might, therefore, be viewed as within the "physical barrier" category described by Justice Black in *Fortner*. However, even barring the application of one of the presumptions of sufficient economic power, as has been indicated there is a great likelihood that the "tie-out" will satisfy the sufficient economic power requirement on purely market analysis.

The courts, however, have gone even further, intimating that the successful imposition of a number of tying arrangements is itself sufficient evidence of economic power in the tying product market. *Northern Pacific* first noted that "the very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power . . . ."[94] After a series of cases furthering this concept,[95] *Advance Business Systems & Supply Co. v. SCM Corp.*[96] concluded that "a seller's successful imposition of a tying arrangement on a substantial amount of commerce may be taken as proof of his economic power over the tying product."[97] It should be noted, however, that *Fortner*[98] had qualified this presumption

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[92] *See* Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 86 HARV. L. REV. 1201, 1208 (1973).

[93] 356 U.S. 1 (1958).

[94] *Id.* at 7-8.

> [T]he presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie. Such appreciable restraint results whenever the seller can exert some power over some of the buyers in the market. . . . Accordingly, the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms *such as a tie-in*, with respect to any appreciable number of buyers within the market.

Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 503-04 (1969) (emphasis added).

[95] Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 503 (1969), furthered this notion by suggesting that the presumption arose from a finding that "any appreciable number of buyers within the market" were forced to become parties to the tying arrangements in question. *See also* 9 J. VON KALINOWSKI, *supra* note 10, § 64.05[2], at 64-90.

[96] 415 F.2d 55, 62 (4th Cir. 1969).

[97] *See* N. W. Controls, Inc. v. Outboard Marine Corp., 317 F. Supp. 698 (D. Del. 1970).

[98] Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969).

> Although the Supreme Court reversed the lower court, it recognized the validity of its reasoning that no inference could be drawn from a single buyer's acceptance of the tie-in. The Court therefore rested its finding that the seller had sufficient power over the tying product on a factual assessment of the product's "uniqueness" and "desirability" rather than on mere success in imposing the tie-in.

Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55, 67-68 (4th Cir. 1969).

by noting that a single buyer's acquiescence in a tying scheme is insufficient to infer the needed market power over the tying product.

The theory which underlies the presumption created by multiple tying arrangements will be difficult to apply to shopping center "tie-outs." In the normal tie-in, success in restricting competition is manifest in an agreement thereby allowing one to ascertain whether or not an "appreciable number of buyers within the market"[99] were forced to become parties to tying arrangements. In contrast, shopping center "tie-outs" can effectively restrict competition and yet not be evidenced by any agreement. This is accomplished by excluding prospective competitors from the market altogether.[100] Although "tie-outs" can also be manifested in restrictive covenants thereby allowing application of the multiple tying arrangement presumption, the probability of "tie-outs" being manifested in total exclusion of prospective competitors renders application of the presumption impractical as an accurate assessment of economic power.

It is therefore apparent that "tie-outs" fit well within the scheme of traditional tying arrangements. Even in the absence of a presumption of "sufficient economic power," "tie-out" arrangements are certainly conducive to a finding of such power through normal market analysis and will thereby trigger the application of the per se rule.

d. The "not insubstantial amount" of commerce prerequisite

As with the "sufficient economic power" prerequisite, the "not insubstantial amount" of commerce prerequisite has lost much of its vitality. Justice Black, in *Fortner*, established that:

> The requirement that a "not insubstantial" amount of commerce be involved makes no reference to the scope of any particular market or to the share of that market foreclosed by the tie . . . . Normally the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie. . . .[101]

Justice Black went on to indicate that in ascertaining whether a substan-

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[99] *See* Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 504 (1969).

[100] It could be argued that this effect of the "tie-out" arrangement would be better visualized as a concerted refusal to deal (boycott). Concerted action is formed between the "preferred tenant," the holder of the veto power, and the developer, who conferred such power. Although the elements of a boycott are numerous in this circumstance, so also are the elements of a "tie-in." Additionally, some difficulty has been encountered and criticism evoked in past attempts to label these activities as a "boycott." *See* Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 86 HARV. L. REV. 1201, 1212 (1973); Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 18 VILL. L. REV. 721, 729-36 (1973).

[101] Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 501 (1969). *See also* Northern Pac. Ry. v. United States, 356 U.S. 1, 9 (1958).

tial amount of commerce is affected, "the relevant figure is the total volume of sales tied by the sales policy under challenge, not the portion of this total accounted for by the particular plaintiff who brings suit."[102] The *Fortner* rationale, frequently termed the test of "absolute quantitative substantiality,"[103] was quickly applied by *Advance Business Systems & Supply Co. v. SCM Corp.*,[104] which held that the *number* of leasing arrangements involved in the tie (in this case eight) was not relevant, but that, as explained in *Fortner*, it was instead the *total volume* of sales tied by the sales policy in controversy. Finding such to total $7,000,000, the court held that clearly a substantial volume of commerce was affected. In *Fortner*, $200,000 was held to constitute a substantial volume of commerce, and in *International Salt Co. v. United States*,[105] $500,000 was deemed sufficient. Clearly, any tie involving several hundred thousand dollars will meet the presently formulated test of "quantitative substantiality."

As indicated by *Fortner*, whether or not the amount of commerce affected is *de minimis* depends on the dollar volume of business foreclosed to competitors by the tying arrangement. Determination of the existence of *successful* ties is thus important in arriving at an accurate assessment of the volume of business foreclosed to competitors. As with the "sufficient economic power" prerequisite and the multiple tying arrangement presumption,[106] the fact that the success of the "tie-out" is manifested in both the visible agreement restricting competition with an incoming satellite tenant and in the invisible exclusion of prospective satellite tenants from the market[107] renders application of the "quantitative substantiality" test difficult. Recognition, however, that the underpinning of this difficulty is a much broader and more serious effect on commerce argues strongly for a bypassing of this prerequisite altogether or at least a substantial lessening of its significance.

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[102] Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502 (1969).

[103] *See* M. HANDLER, *supra* note 21, at 797 n.18.

[104] 415 F.2d 55 (4th Cir. 1969).

[105] 332 U.S. 392, 396 (1947).

[106] *See* notes 99 and 100 and accompanying text *supra.*

[107] The definition of the relevant market is important in the recognition of the effective elimination of competition by the exclusion of a competitor from the shopping center area. A number of courts have recognized that there exist no limits as to how small or large such an area need be. Denver Petroleum Corp. v. Shell Oil Co., 306 F. Supp. 289, 305-06 (D. Colo. 1969). In Gamco, Inc. v. Providence Fruit & Produce Bldg., 194 F.2d 484 (1st Cir. 1952) the court defined the relevant market as a single building in which produce trade habitually took place. The parallel between the building in *Gamco*, which buyers habitually frequented, and the shopping center area, which customers habitually frequent is obvious. Even if the two situations are not equated and therefore the shopping center area does not constitute a relevant market, certainly it can be deemed to constitute a substantial market in which the exclusion of competitors would significantly reduce competition.

It should also be recognized that the "not insubstantial amount" of commerce prerequisite is often phrased in terms of the amount of sales tied to the tying product. Although couched in terms of the existence of two products, it seems clear that "quantitative substantiality" is a measure of the effect on competition in a second product market. In this respect, the test is clearly applicable to "tie-outs."

In spite of the "invisible effect" handicap, the current ease of establishing "quantitative substantiality" should, due to the partial visibility of the "tie-out" effect in those who become tenants on a restrictive basis, allow for easy satisfaction of this prerequisite by most "tie-outs."

V. A Movement Away From Emphasis on Form

Although "tie-outs" apparently conform to the theoretical and mechanical underpinnings of tying theory, the question remains whether any movement in their direction has been evinced. Evidence indicates that there has been.

Tying arrangements are no longer viewed as solely two product tie-ins.[108] *Northern Pacific Railway v. United States*[109] illustrates this movement. *Northern Pacific* involved the alleged tie of "preferential routing clauses" to the lease or sale of desired land. These clauses required the grantee or lessee to ship its product via Northern Pacific Railway. *Northern Pacific* represented a break from prior conceptions of tying arrangements wherein most tying products were *patented commodities*. As indicated, the tying product in *Northern Pacific* was land. In justifying this movement, Justice Black in speaking for the Court in *Northern Pacific* proclaimed that the "vice of tying arrangements lie in the use of economic power in one market to restrict competition on the merits in another, *regardless of the source from which the power is derived*. . . ."[110]

In another unusual arrangement deviating somewhat from the normal conception of a tie-in, Justice Black, speaking for the Court, noted that:

> [T]ie-ins involving credit can cause all the evils that the antitrust laws have always been intended to prevent, crippling other companies that are equally, if not more, efficient in producing their own products. Therefore, the same inquiries must be made as to economic power over the tying product and substantial effect in the tied market, but where these factors are present no special treatment can be justified solely because

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108 *See generally* C. Hills, *supra* note 15; 2 J. von Kalinowski, *supra* note 10; M. Handler, *supra* note 21.

109 356 U.S. 1 (1958).

110 *Id.* at 11 (emphasis added).

> credit, rather than some other product, is the source of the tying leverage used to restrain competition.[111]

Northern Pacific and *Fortner* both evidence a departure from the two *commodity* tie-in conception of tying arrangements. In so doing, they emphasize that the basic element distinguishing a tying arrangement is the inherent tendency for economic power derived from one market to be coercively employed to restrict competition in a separate and distinct second market. Likewise, both cases stress that the employment of any *particular* kind or form of lever (*e.g.*, tying *commodity*) is not critical to a finding of a tying arrangement.

Another more unsettled area in which evidence of a movement away from two commodity ties exists involves the trademark tying product cases. These cases concern the question of the ability of a franchise or trademark to constitute a separate and distinct product tying to their distribution other products used in connection with the business franchised.[112] Clearly such cases mark a departure from traditional thought in two commodity terms and indicate an increasing emphasis upon the substance as opposed to the form of tying theory.

The above is not a movement toward elimination of the *tied product* from the form of tying arrangements. Yet, these cases indicate that the form of a tying arrangement should not take precedence over its underlying substance. The same compelling arguments set forth in *Northern Pacific*, *Fortner*, and the trademark tying cases for expanding tying theory from tying commodities to other tying devices can also be made for expanding tying theory from tied *products* to other mechanisms that achieve the same restriction of competition in the second product market. The point is that the form in which it is manifested is irrelevant if the basic element of tying arrangements exists; that is, that market power in one market is coercively employed to restrict competition in a separate and distinct second market. The Supreme Court seems to have recognized this principle and should thus recognize the same in the case of the "tie-out."

VI. A RELUCTANCE TO APPLY THE PER SE RULE

Despite the theoretical and mechanical conformity of "tie-outs" to the scheme of tying arrangements, doubt may exist as to its classification as a per se offense. Although there is some indication to the contrary,[113]

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[111] Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 509 (1969).

[112] *See, e.g.*, Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971); Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964).

[113] *See, e.g.*, Ohio v. Andrew Palzes, Inc., 5 TRADE REG. REP. (1973 Trade Cas.) ¶

in the shopping center situation a general reluctance not only to find such arrangements per se illegal but also to find them illegal at all has been evidenced by the courts.[114] This reluctance appears to be due to the alleged business justifications for such arrangements and the alleged ramifications which would occur from their treatment as illegal.[115] On the other hand, one could argue that due to the nature of the purpose and effect of such arrangements, thus allowing their classification as per se illegal, economic justifications should be irrelevant.[116] Moreover, it may be said that all such business interests (*e.g.*, the creation of a diversified and appealing shopping center) may be unilaterally obtained through the actions of either the developer or the tenants.[117]

At any rate, the reluctance of the courts to adopt a per se rule with respect to such arrangements poses the question whether a similar reluctance will occur with respect to the "tie-out" arangement, at least in the context of the shopping center. In light of the conformity of the "tie-out" to the underpinnings of the body of tying theory, if the court rebuffs a per se classification, the foundation for such action must rest upon an inherent difficulty within the *category* of tying arrangements.

Aside from the question of the specific alleged business justifications

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74,764, at 95,327 (C.P. Cuyahoga County, Nov. 2, 1973); United States v. Wachovia Bank & Trust Co., 1972 Trade Cas. ¶ 74,109, at 92,629 (M.D.N.C. 1972) (consent decree).

[114] Savon Gas Stations Number Six, Inc. v. Shell Oil Co., 309 F.2d 306 (4th Cir. 1962), *cert. denied*, 372 U.S. 911 (1963); Plumtree, Inc. v. N. K. Winston Corp., 351 F. Supp. 80 (S.D.N.Y. 1972); Dalmo Sales Co. v. Tysons Corner Regional Shopping Center, 308 F. Supp. 988 (D.D.C.), *aff'd*, 429 F.2d 206 (D.C. Cir. 1970).

[115] For a discussion of the alleged business justifications for shopping center restrictive arrangements see Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 18 VILL. L. REV. 721, 743-745 (1973). *See also* BNA ANTITRUST & TRADE REG. REP. NO. 573 at A-22 (July 24, 1972), where in response to an FTC complaint and order, Gimbels argued that the order, among other things, would (1) compel large department stores to channel future expansions to freestanding stores without adjacent competitive establishments; (2) deter large department stores from making long-term financial commitments essential to the creation and development of shopping centers; (3) deprive consumers of the convenience and benefits of competition to be derived from retail shopping centers; and (4) destroy the investments of both large and small tenants in existing retail shopping centers made in reliance upon the expected success of a broad mix of competing tenants.

[116] This argument is essentially that of all per se classifications. The courts have repeatedly indicated that when conduct is identified as within the per se category no business justifications will save its condemnation. For example, Justice Black in Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959), noted that: "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances. . . ."

[117] Thus, the developer may unilaterally select those tenants he feels will both conform to the desired image of the center and likewise provide the proper "mix" of tenants to afford shoppers an attractive and diversified center. It can be argued, however, that even in light of this, the preferred tenant has the right to seek some assurance in the form of restrictive covenants.

for the shopping center arrangements, a number of established business justifications exist excepting tying arrangements from the per se rule.[118]

> [T]he only defenses recognized for tying are those necessary for survival or for the enhancement of competition by small or relatively impotent competitors—such as where it is essential to establish a new product or industry, to salvage a failing company, or to enable small competitors to compete against giants in the industry.[119]

Although other forms of the "tie-out" may fall prey to these business defenses it is difficult to see their application to the shopping center "tie-out." It may be argued that since such arrangements are typically formed at the developmental stage of the shopping center they are within the reach of the new business defense. Upon closer scrutiny, however, even if applicable this defense is acceptable *only* during the infancy period of the center. Moreover, the defense is designed to protect new products and industries in situations where it is critical that goodwill be maintained.[120]

In this light, if shopping center "tie-outs" are to be exempted from the application of the per se rule due to alleged business justifications, then a new defense or a new prerequisite will have to be created. To follow this course of action will increase the complexity and confusion already existing within the tying area. Moreover, such a policy unjustifiably divorces shopping center "tie-outs" from the body of per se tying arrangements although they are indistinguishable in substance.

VII. CONCLUSION

The advent of the shopping center restrictive covenant problem and the promulgation of the "tie-out" arrangement has the potential of adding a new dimension to the field of tying arrangements. The disposition of "tie-out" arrangements should not be in doubt in light of current trends in the development of tying theory. The courts, in keeping with the acknowledged "pernicious effects"[121] of tying arrangements have broadly applied the per se rule. Although unorthodox in form, "tie-outs" are theoretically and mechanically consistent with the body of tying

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[118] As indicated above, these business defenses may be thought of as part of the single product defense. See note 27 *supra*.

[119] Day, *supra* note 5, at 587. *See also*, White Motor Co. v. United States, 372 U.S. 253 (1963); Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653 (1st Cir. 1961); United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960).

[120] United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960). *See also* C. HILLS, *supra* note 15.

[121] *See* Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958). For the issue of tying arrangements faring harshly under the antitrust laws, *see* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 606 (1953).

arrangements. If one accepts application of the per se rule to the body of traditional tying arrangements, then the question of its appropriateness in the "tie-out" situation should not arise.

Collaterally, however, the "tie-out" arrangement may act as a catalyst with respect to the question of the legitimacy of the per se classification of the category of tying arrangements. In discussing the development of per se categories, a continuum was envisioned upon which the measure of proof and market inquiry required to establish the illegality of suspect conduct was a reflection of the nature of the conduct in question.[122] It is with this in mind that we should conclude.

The difficulty with the perpetuation of the per se label is that it tends to conjure up notions of a night and day division of suspect conduct, depending upon whether or not such conduct is subject to per se classification. In reality, however, some of these categories of conduct occupy a "grey area" of the continuum which is not located directly at the per se illegal extreme. Thus, the tying category may be thought of as being more inclusive than other per se categories. In this respect, although a large portion of the conduct contained within the category can easily be seen as occupying the per se illegal extreme of the continuum, a sizeable segment of tying conduct requires more extensive market inquiry and greater proof to demonstrate its illegality.

The courts have attempted to delineate types of conduct within the tying category on the basis of the amount of required proof. The method employed has been, however, to either classify the conduct as per se or exempt the conduct through the perpetuation of the artifices of business justifications and prerequisites.[123] The erroneous impression created is that a black and white distinction exists with respect to conduct within the tying category requiring differing amounts of proof to establish its illegality. The promulgation of such artifices has served to confuse rather than clarify an already complex area of the law. Perhaps the advent of the "tie-out" arrangement will stimulate a much needed re-evaluation of this very confused area.

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[122] *See* note 5 and accompanying text *supra.*

[123] Admittedly many could through semantical arguments contend that these prerequisites and business justications are not exemptions from a per se rule but instead tools to identify the conduct as within the antitrust definition of tying arrangements and therefore deserving of the per se label. The point is, however, that that is exactly what they are—semantical arguments. In substance it is difficult to conclude that all these contrivances are not in fact means of circumventing the normal conception of a per se rule.